Supreme Court, U.S.
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03-1184 FEB 20 2004

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

DONALD J. DIBBLE,

Petitioner,

v.

JOHN H. FENIMORE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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February 20, 2004

QUESTION PRESENTED

Are adjutants general sued in official capacity for equitable relief under 42 U.S.C. § 1983 immune from all federal constitutional and statutory claims arising incident to state military service--except facial challenges to military regulations?

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OPINIONS AND ORDERS

The decision below, App. 1a, is reported at 339 F.3d 120. The appellate court's denial of rehearing, App. 42a, is unreported. The district court's initial decision, App. 17a, is reported at 84 F.Supp.2d 315. The district court's unreported denial of reconsideration, App. 35a, appears at 2000 U.S. Dist. LEXIS 9240.

JURISDICTION

The judgment sought to be reviewed was entered August 8, 2003. The court below denied rehearing November 24, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I (excerpt)

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

5 U.S.C. § 7102 (excerpt)

Each employee shall have the right to form, join, or assist any labor organization . . . freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right . . . to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the

labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities.

32 U.S.C. § 709(f) (excerpt)

[A] . . . suspension . . . shall be accomplished by the adjutant general.

42 U.S.C. §1983 (excerpt)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Dibble, a former member of the New York Air Guard and former federal excepted service technician employed by the Air Guard under 32 U.S.C. § 709, sued the New York Adjutant General, in official capacity, for equitable relief under 42 U.S.C. § 1983. Dibble claimed that the Air Guard denied him reenlistment in retaliation for his exercise, during civilian technician employment, of (1) his right under 5 U.S.C. § 7102 to assist and to act for a labor organization; (2) his right under 32 U.S.C. § 709(f) to appeal (successfully) his suspension from employment; and (3) his First Amendment rights to (a) associate with fellow civilian employees in a union, (b) petition for redress, and

in furtherance of his and fellow employees' rights in a non-disruptive manner expressly authorized by federal law.[1] The district court had federal question jurisdiction under 28 U.S.C. § 1331.

The district court, denying Fenimore's motion to dismiss, held Dibble's claims justiciable. App. 26a, 40a. Fenimore appealed immediately, asserting intra-military immunity. The Court of Appeals sustained the immunity claim, holding that only facial challenges to, or violations of, military regulations are justiciable. App. 14a, 15a.

ARGUMENT

I

The decision below conflicts with those of other circuits

As the court below acknowledged, App. 11a-12a, its decision conflicts with *Wigginton v. Centracchio*, 205 F.3d 504, 512 (1st Cir. 2000) ("intramilitary suits alleging constitutional violations but not seeking damages are justiciable"); and *Jorden v. National Guard Bureau*, 799 F.2d 99, 108-111 (3rd Cir. 1986) (discharge of National Guard member in retaliation for exercise of First Amendment rights may be equitably redressed). The decision below also conflicts with *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989) (release of Reserve

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[1] Dibble also sued the Secretary of the Air Force, in official capacity, seeking review of the Air Force Board for Correction of Military Records decision that refused relief from the simultaneous denial of Dibble's federal military reenlistment. Dibble's claim against the Secretary was not at issue in the court below. It remains before the district court.

officer from active duty under 10 U.S.C. § 681(a) subject to judicial review upon claim that release was unconstitutionally motivated).

The lower court said it found "more persuasive" decisions reasoning that only facial challenges to military regulations are justiciable. App. 13a-14a, *citing Knutson v. Wisconsin Air National Guard*, 995 F.2d 765, 771 (7th Cir. 1993); *Watson v. Arkansas National Guard*, 886 F. 2d 1004, 1008-10 (8th Cir. 1989); *Crawford v. Texas Army National Guard*, 794 F.2d 1034, 1036 (5th Cir. 1986). *See also*, *Speigner v. Alexander*, 248 F.3d 1292, 1297 (11th Cir. 2001) (same).

These decisions, however, conflict with the Second Circuit's own decision in *Jones v. New York State Division of Military and Naval Affairs*, 166 F.3d 45, 52 (2d Cir. 1998), which held that a state Guard member may obtain injunctive relief from the military's violation of its own regulations.[2]

The question presented involves interests of exceptional importance--military need and the enforcement of constitutional rights. The Court should resolve the conflict among the circuit courts over this important question.

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[2] The *Jones* decision, to the extent it deems justiciable any claim alleging failure to follow military regulations, conflicts with *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 374-375 (2d Cir. 1968) (claim of regulatory violation nonjusticiable if interpretation of regulation requires military expertise).

II

The decision below conflicts with the reasoning of this Court's opinions

The ruling below is inconsistent with the reasoning of *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669 (1987). In holding servicemembers' individual capacity suits for damages to be nonjusticiable, both decisions distinguished official capacity suits for equitable relief. *Chappell*, 462 U.S. at 303, 304 (military correction board decision denying military promotion subject to judicial review; Court has "never held . . . that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service"); *Stanley*, 483 U.S. at 683 ("redress designed to halt or prevent the constitutional violation" distinguishable from "award of money damages").

Contrary to the opinions in *Chappell* and *Stanley*, the court below and other appellate courts[3] have held that official capacity suits for injunctive relief are not distinguishable, for purposes of justiciability, from individual capacity suits for damages. The First, and Third Circuits, however, have recognized the distinction. *Wigginton v. Centracchio*, 205 F.3d 504 (1st Cir. 2000); *Jorden v. National Guard Bureau*, 799 F.2d 99 (3rd Cir. 1986). The court below recognized the distinction as to claims alleging violations of military regulations. App.

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[3] *Speigner v. Alexander*, 248 F.3d 1292, 1297 (11th Cir. 2001) *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765, 771 (7th Cir. 1993); *Watson v. Arkansas National Guard*, 886 F. 2d 1004, 1008 (8th Cir. 1989).

15a, *citing Jones v. New York State Division of Military and Naval Affairs*, 166 F.3d 45 (2d Cir. 1998).

The decision below identified no reasoning in *Chappell* or *Stanley* precluding equitable claims except facial challenges to, or alleged violations of, military regulations. There is none to be found. In *Brown v. Glines*, 444 U.S. 348, 357 n. 15 (1980), the Court said permissible claims are not limited to facial challenges. Military correction board cases approved by the *Chappell* opinion, 462 U.S. at 303, typically concern individual complaints, not facial challenges, and often present constitutional and statutory claims, not just violations of military regulations. *See, e.g., Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989); *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979).

III

The holding below allowing facial challenges to regulations and individual regulatory claims, but precluding individual statutory or constitutional claims, has no basis in justiciability principles

Courts properly have recognized four grounds upon which a challenge to military action can be deemed to be nonjusticiable. None of these grounds applies here. And none is related to whether the challenge attacks a military regulation on its face or concerns an individual decision, or claims violation of a military regulation rather than violation of a statute or the Constitution.

Intra-military immunity

Intra-military immunity applies to damages claims brought by military members against other military members in their individual capacities. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (intra-military immunity precludes "exposing officers to personal liability at the hands of those they are charged to command").[4] In *Chappell* the Court expressly recognized that suits for equitable relief by military members against military officials sued in their official capacities--such as cases against military service heads challenging separation from the military or denial of military promotion--are not precluded. 462 U.S. at 303, 304.[5] In *United States v. Stanley*, 483 U.S. 669 (1987), the Court followed *Chappell*. The Court held intra-military damages actions barred, but

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[4] Intra-military immunity results in servicemembers being unable to sue the federal government for damages for torts committed by other servicemembers, *Feres v. United States*, 340 U.S. 135 (1950), but this is not because intra-military immunity, itself, extends to the federal government. Rather, it is because the federal government has sovereign immunity from tort damages suits to the extent that immunity is not waived by the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq*. Because the FTCA makes the United States liable only where the federal tortfeasor would be personally liable, and intra-military immunity precludes personal liability, the United States cannot be held liable in damages for intra-military torts.

[5] Contrary to the Eleventh Circuit's view, the *Chappell* holding is not based on deference "to the military establishment." *Speigner v. Alexander*, 248 F.3d 1292, 1297 (11th Cir. 2001). Rather, it is based on the need to protect military personnel from "personal liability." *Chappell*, 462 U.S. at 304. This protection is necessary because "the need for unhesitating and decisive action . . . would be undermined by . . . exposing officers to personal liability." *Id.* This point is inapplicable to official capacity suits.

echoed *Chappell*'s distinction between "redress designed to halt or prevent the constitutional violation" and "award of money damages." 483 U.S. at 683.[6]

Because intra-military immunity precludes only individual capacity damages suits, not official capacity equitable claims, the doctrine does not address different types of equitable claims. Whether an official capacity equitable action presents a facial challenge; attacks an individual decision; or claims violation of a regulation, statute, or the Constitution is irrelevant.

Issues requiring military expertise

A second ground on which a challenge to a military decision may be held nonjusticiable is lack of judicial competence to decide the specific question presented, because the question requires military expertise. This principle can apply in suits by civilians as well as military members. The decision in *Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969), illustrates the point. There, the court held that whether reserve fleet vessels were "available" to transport military cargo, within the meaning of a statute requiring that available domestic vessels be used before foreign vessels, was nonjusticiable because the issue was

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[6] In declining to recognized the distinction drawn in *Chappell* and *Stanley* between damages actions and official capacity suits for equitable relief, the court in *Watson v. Arkansas National Guard*, 886 F. 2d 1004, 1008 (8th Cir. 1989), erroneously reasoned that "[t]he judiciary does not acquire competence in this area merely because the remedy sought is an injunction rather than damages." Contrary to the *Watson* court's assumption, intra-military immunity from damages is not based on lack of judicial competence to adjudicate all constitutional or federal statutory claims that arise incident to military service. Rather, intra-military immunity from damages is based on the need to protect service members from personal liability. *Chappell*, 462 U.S. at 304.

one of a "narrow band of matters" involving "decisions relating to the conduct of national defense" in which "the national interest contemplates and requires flexibility in management of defense resources" and "the particular issues call for determinations that lie outside sound judicial domain in terms of aptitude, facilities, and responsibility." 420 F.2d at 131, 129. *See also United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 374-375 (2d Cir. 1968) ("while the regulations wisely give . . . specific content to [the hardship exemption from military service], a good deal is necessarily left to the judgment of the commanding officer"; "administration of the hardship exemption necessarily involves a balancing of the individual's claims against the nation's needs, and the balance may differ from time to time and from place to place in a manner beyond the competence of a court to decide").[7]

Application of the *Curran* principle does not depend on whether the plaintiff presents a facial challenge; attacks an individual decision; or claims violation of a regulation, statute, or the Constitution. Any of these kinds of cases might raise specific issues requiring military expertise beyond judicial competence.

The *Curran* principle does not apply to Dibble's suit. Dibble does not claim that he was denied reenlistment

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[7] The *Curran* principle, as noted, applies only to the "narrow band of matters" that require military expertise, *Curran*, 420 F.2d at 131; *Schonbrun*, 403 F.2d at 374-375, not to all service-related claims. Courts properly "defer to the superior experience of the military in matters of duty orders, promotions, demotions, and retentions," *Speigner*, 248 F.3d at 1298, *quoting Knutson v. Wisconsin Air National Guard*, 995 F.2d 765, 771 (7th Cir. 1993), when they decline to decide specific issues that require military expertise.

based on unsound military judgment. He claims that the decision was not based on military judgment at all--that he was denied reenlistment in retaliation for exercise of First Amendment and federal statutory rights. Adjudication of these claims requires no military expertise. It does not involve review of the wisdom of military opinions.

Delay of availability of military assets

A third ground on which a challenge to a military decision may be held nonjusticiable is where adjudication would delay availability of military assets. *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 374-375 (2d Cir. 1968) ("delay in the call-up of a reservist, even during the period necessary for judicial consideration of his claim to discretionary exemption, inevitably means . . . a gap in the unit").[8] The *Schonbrun* principle does not apply to suits, like Dibble's, which challenge military separations rather than call-up orders. Dibble's claims, if successful, would not deprive the military of assets, and adjudication of his claim therefore would not delay availability of military assets. The United States Court of Federal Claims routinely reviews military separation cases, and has authority to order reinstatement. *Woodward v. United States*, 871 F.2d 1068

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[8] Although a "gap in the unit" might be avoided by "call of another reservist who otherwise might not have been reached," *id.*, the gap would not be avoided if that other reservist also challenged the call-up decision. Allowance of Schonbrun's claim would allow class action challenges to call-up decisions, making gaps in the units unavoidable. In this setting, adoption of the Eleventh Circuit's "facial challenges only" rule, instead of the *Schonbrun* principle, would have a perverse effect, since facial challenges to military regulations affect large numbers of servicemembers, threatening greater deprivation of military resources than a challenge applicable only to one plaintiff.

(Fed. Cir. 1989); *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979).[9]

Because reinstatement is an available remedy in correction board cases--like *Woodward* and *Sanders*--there is no reason to withhold this remedy in other official capacity military suits. The point has particular applicability to reinstatement suits by former National Guard members like Dibble, because separation from the Guard simultaneously severs both federal and state military membership. A rule allowing judicial restoration of the former, but not the latter, would be meaningless, and have no basis in justiciability principles.[10]

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[9] On this point, the court in *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765 (7th Cir. 1993), erroneously reasoned that, because military reinstatement claims can require years to litigate, military separation in violation of the Constitution should be tolerated. The idea that the military cannot "staff properly," maintain "operational readiness," or properly conduct "training programs" while it "await[s]" the outcome of reinstatement litigation, *Knutson*, 995 F.2d at 771, is absurd. The mere filing of reinstatement litigation does not require the military to change its staffing, operations, or training. And even if the possibility of future reinstatement of an unconstitutionally-separated service member could be deemed to "significantly hamper" current staffing and mission accomplishment, *id.*, this possibility would not be a rational reason to allow facial challenges to military regulations, while disallowing challenges to individual personnel decisions. Simultaneous reinstatement of tens of thousands of members incident to judicial invalidation of an unconstitutional military regulation would cause far greater change in military staffing and operations than reinstatement of a single individual.

[10] Contrary to the *Speigner* court's opinion, 248 F.3d at 1296, official capacity suits for military reinstatement do not "tamper with the established relationship between enlisted military personnel and their superior officers," *Chappell v. Wallace*, 462 U.S. 296, 300 (1983), because these suits do not subject military officers to personal liability. *Chappell*, 462 U.S. at 304.

Absence of cognizable legal standard

A fourth ground on which a challenge to a federal military decision may be held nonjusticiable arises under the review provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, which apply to federal agencies generally, including the military. 5 U.S.C. § 551. Claims which challenge discretionary decisions, and which are not founded on either the Constitution or a statute or regulation embracing a cognizable legal standard, are unreviewable because they concern matters "committed to agency discretion" under 5 U.S.C. § 701(a)(2). *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 409 (1971) (agency decision is "committed to agency discretion" where there is "no law to apply").[11]

Dibble's claims against Fenimore do not concern matters that would be deemed committed to agency discretion under the APA if they concerned federal, rather than state, military membership. Dibble's claims are based on the First Amendment and a federal statute that embraces cognizable legal standards affording federal employees rights to serve as union representatives. These claims are justiciable. *Jones v. New York State Division of Military and Naval Affairs*, 166 F.3d 45, 52 (2d Cir. 1998) (holding justiciable Guard member's claim for injunctive relief from New York State military's violation of its own regulation);

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[11] The *Curran* court invoked this principle. 420 F.2d at 128. *Curran*, however, was decided before this Court's decision in *Citizens to Preserve Overton Park*. Under the latter decision, a statute requiring use of an "available" resource states a cognizable legal standard. 401 U.S. at 409. The point in *Curran* that remains valid after *Citizens to Preserve Overton Park* is that claims under an otherwise cognizable legal standard are nonjusticiable if interpretation or application of the standard requires military expertise beyond judicial competence.

Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989) (release of Reserve officer from active duty under 10 U.S.C. § 681(a) subject to judicial review upon claim that release was unconstitutionally motivated); *Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989) (denial of military promotion reviewable for statutory violations); *Jorden v. National Guard Bureau*, 799 F.2d 99, 108-111 (3rd Cir. 1986) (discharge of National Guard member in retaliation for exercise of First Amendment rights may be equitably redressed); *Neal v. Secretary of the Navy*, 639 F.2d 1029, 1041 n. 11, 1044 (3d Cir. 1981) (absence of right to reenlist does not preclude judicial review of enlistment denial where statutory standard was violated).

Whether a claim is based on a cognizable legal standard does not depend on whether the standard is found in a regulation, a statute, or the Constitution. Nor does it depend on whether the claim challenges a military regulation on its face or challenges an individual decision.

None of the four bases of the nonjusticiability doctrine applies to Dibble's claims. None of the differences between facial challenges to regulations and challenges to individual decisions has any bearing on justiciability. The holding below that individual claims based on military regulations are justiciable, but individual claims based on statutes or the Constitution are not, is unexplained and inexplicable.

The decision below is an arbitrary minimization of military suits, not a reasoned application of justiciability principles.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 20, 2004

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ON PETITION FOR WRIT OF CERTIORARI
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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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February 20, 2004 — *Counsel of Record for Petitioner*

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000
(Argued: February 14, 2001 Decided: August 8, 2003)
Docket No. 00-6243

DONALD J. DIBBLE,

Plaintiff-Appellee,

-v.-

JOHN H. FENIMORE, V, MAJOR GENERAL,
NEW YORK AIR NATIONAL GUARD,

Defendant-Appellant,

SECRETARY OF THE AIR FORCE F. WHITTEN
PETERS,

Defendant.

Before:

KEARSE, LEVAL AND KATZMANN,
Circuit Judges.

Former National Guard member sued the commander of the New York State Air National Guard, claiming that he was unlawfully discharged in retaliation for his

constitutionally protected activities as a union steward. The United States District Court for the Northern District of New York (Kahn, *J.*) denied defendants' motion to dismiss. State Defendant brought an interlocutory appeal challenging the denial of the motion to dismiss. The Court of Appeals (Leval, *J.*) holds that (a) the interlocutory order denying the defendant's motion to dismiss was immediately appealable as a collateral order covered by *Cohen v. Industrial Beneficial Loan Corp.*, 337 U.S. 541 (1949), and (b) the commander of the New York Air National Guard was immune from suit under *Feres v. United States*, 340 U.S. 135 (1950). REVERSED and REMANDED with direction to dismiss the action.

MICHAEL S. BUSKUS, Assistant Solicitor General, for Eliot Spitzer, Attorney General of the State of New York (Nancy A. Spiegel, Assistant Solicitor General; Peter H. Schiff, Senior Counsel, *on the briefs*), Albany, New York, for *defendant-appellant*.

DANIEL M. SCHEMBER, Gaffney & Schember, P.C., Washington, D.C., for *plaintiff-appellee*.

LEVAL, *Circuit Judge*:

Defendant-appellant John Fenimore is Major General and Commander of the New York Air National Guard ("Air Guard" or "Guard"). Plaintiff-appellee Donald J. Dibble was a staff sergeant with the Air Guard.[1] In late 1994,

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[1] Dibble's staff sergeant position is classed as federally excepted civilian employment. Dibble was required by 32 U.S.C. § 709(b) to maintain military membership in the Air Guard as a condition of this employment.

Dibble was ordered honorably discharged from the Guard and denied the opportunity to re-enlist.[2] Following his dismissal (and the unsuccessful pursuit of various intra-military administrative remedies), Dibble brought this action in the United States District Court for the Northern District of New York (Kahn, *J.*), claiming that he was unlawfully denied re-enlistment in retaliation for his constitutionally and statutorily protected activities as a union steward.[3] Fenimore moved to dismiss, arguing, inter alia, that Dibble's claims were non-justiciable under the doctrine of intra-military immunity. The district court denied the motion and on reconsideration, adhered to its decision. Fenimore brought this appeal.[4]

This case presents two issues: (1) whether the interlocutory order denying the motion of the Commander of the State National Guard to dismiss the suit by reason of the doctrine of intra-military immunity is immediately appealable under the collateral order rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); and

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[2] The stated reason for Dibble's dismissal was his "performance in a military capacity."

[3] Specifically, Dibble alleges that he was dismissed as a result of his exercise of (1) his right under 5 U.S.C. § 7102 to assist and act for a labor organization; (2) his right under 32 U.S.C.§ 709(e)(5) (since recodified as 32 U.S.C. § 709(f)(4) and Technician Personnel Regulation (TPR) 752 § 2-17, Element 6(b), to appeal (successfully) his thirty-day suspension from employment; and (3) his First Amendment right to associate in a union and to speak freely in furtherance of his and fellow employees' rights.

[4] The suit also named the Secretary of the United States Air force. As to that defendant, the district court remanded the case to the Air Force Board for the Correction of Military Records for administrative proceedings. Those proceedings are still pending.

(2) if so, whether such a suit is non-justiciable under the doctrine of intramilitary immunity. For the reasons set forth below, we conclude that (1) the district court's order was immediately appealable and (2) that defendant's motion to dismiss should have been granted.

DISCUSSION

A. Appealability

Interlocutory orders of federal district courts are not ordinarily appealable until the rendition of a final decision. *See* 28 U.S.C. § 1291. A "final decision" is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). An order denying a defendant's motion to dismiss on the grounds of intramilitary immunity is certainly not "final"; indeed, such an order "ensures that litigation will continue in the District Court." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 (1988). In limited circumstances, however, federal appellate courts may review nonfinal orders. For example, under the collateral order rule of *Cohen*, appeals may be taken in "that small class which finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* at 546.

District court orders denying claims of immunity are at times held appealable, because, as appellant notes, immunity is intended to shield the defendant not only from an adverse outcome, but also from the burden of having to

go through the litigation process at all. As the Supreme Court has observed with respect to a state officer's immunity from a suit alleging a constitutional tort under 42 U.S.C. § 1983, the defense is "an immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). This court has applied the collateral order rule to permit appeals from district court orders denying a wide variety of immunity claims. *See, e.g., Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 387 (2d Cir. 2000) (Foreign Sovereign Immunities Act immunity); *Baker v. Coughlin*, 77 F.3d 12, 14 n.2 (official immunity under state law); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 72 (2d Cir. 1992) (municipal immunity); *Smith v. Reagan*, 841 F.2d 28, 30 (2d Cir. 1988) (Eleventh Amendment immunity); *Barrett v. United States*, 798 F.2d 565, 570-71 (2d Cir. 1986) (prosecutorial immunity). *But see In re "Agent Orange" Prod. Liab. Litig.*, 745 F.2d 161, 162 (2d Cir. 1984) (rejecting an interlocutory appeal from an order denying a defense of intramilitary immunity).

Under the collateral order rule, a prejudgment order is eligible for immediate interlocutory appeal if it satisfies three criteria: It "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable [upon the eventual] appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The orders appealed in this case satisfy these three standards. First, there is no dispute that they "conclusively determine" the availability of the immunity defense. Second, the immunity question is separate from

the merits of the action.[5] And as to the third requirement, we conclude that the interlocutory order is "effectively unreviewable" on appeal from a final judgment because an important element "of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985) (citing *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)). The defendant would irrevocably lose this benefit of immunity if obligated to defend the case at trial.

The Supreme Court appears to take this view of the nature of the right, at least with respect to claims of immunity made by officers in the active U.S. military. In *United States v. Stanley*, 483 U.S. 669 (1987), the Court suggested that the process of defending a lawsuit, not merely the end result, compromises military discipline and thus gives rise to immunity. Concerned by the prospect of "compelled depositions and trial testimony by military officers concerning the details of their military commands," the *Stanley* court explained that if a subordinate were allowed to prosecute a lawsuit against his superior officer, "the mere process of arriving at correct conclusions would disrupt the military regime." *Stanley*, 483 U.S. at 682-83. *See also Stencel Aero Eng'g Corp. v. United States*, 431

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[5] The factual record on appeal is somewhat spare, making it difficult to assess whether there are any material facts genuinely in dispute that would bear on the applicability of intramilitary immunity. As this court has noted previously, "[w]here . . . resolution of the immunity defense requires the adjudication of issues of fact that are inseparable from the merits, the denial is not immediately appealable." *Tolbert v. Queens College*, 164 F.3d 132, 138 (2d Cir. 1999); *see also Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996); *Johnson v. Jones*, 515 U.S. 304, 313 (1995). The pleadings are, however, clear enough for us to conclude with relative confidence that the availability of an immunity does not turn on the resolution of any disputed questions of fact.

U.S. 666, 673 (1977) ("The trial would . . . involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions."). We see no reason why this logic would apply with any less force to claims brought by members of the National Guard. *See Jones v. N.Y. State Div. of Military & Naval Affairs*, 166 F.3d 45, 51 (2d Cir. 1999) ("Absent some reasoned distinction, justiciability of constitutional tort actions incident to federal and state military service should be co-extensive.").

Intramilitary immunity is designed to protect a defendant from the obligation to participate in the litigation, and not merely from an adverse result. The loss of such a benefit cannot be vindicated by appeal from an adverse final judgment. Were we required to refrain from hearing an appeal of an interlocutory order denying a claim of intramilitary immunity, the benefit claimed by the defendant (freedom from the burden of suit) would be irrevocably lost by the time we were able to hear his claim.

We are mindful of our decision in *In re "Agent Orange" Product Liability Litigation*, 745 F.2d 161, in which we declined to exercise jurisdiction over an interlocutory appeal challenging an order denying dismissal on intramilitary immunity grounds. However, we believe *Agent Orange* to be both distinguishable on its facts and in large part superceded by subsequent decisions of the Supreme Court. As to the facts, the order appealed from in *Agent Orange* was "tentative" in its wording, thus raising doubt whether it "conclusively determined" the question of immunity. *Id.* at 163-64. Furthermore, *Agent Orange* relied on an understanding of the intramilitary immunity doctrine since rejected by the Supreme Court. We held in *Agent Orange* that intramilitary immunity was "inextricably

intertwined" with the merits of the action because it was "difficult to predict whether a finding of liability [would] undermine military discipline" without a more complete factual record. *Id.* at 164. Subsequent Supreme Court cases have rejected a particularized inquiry into the effect a suit will have on discipline in determining claims of intramilitary immunity, applying the doctrine instead whenever a plaintiff's injury "arises out of activity incident to [military] service." *Stanley*, 483 U.S. at 681 (internal quotation marks omitted). *See also United States v. Shearer*, 473 U.S. 52, 59 (1985) (defining intramilitary immunity as applicable whenever the plaintiff's claims are "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness"). These same cases have also called into question the argument advanced in *Agent Orange* that an order wrongly denying a claim of intramilitary immunity does "not present a sufficiently grave threat of irreparable harm [such that it] would be effectively unreviewable on appeal from a final judgment." *Agent Orange*, 745 F.2d at 165. *See also Stanley*, 483 U.S. at 682-83.

We conclude that the district court's order denying appellant's claim of intramilitary immunity is immediately appealable under the collateral order doctrine.

B. Justiciability

In *Feres v. United States*, the Supreme Court held that members of the armed services could not sue the government for injuries that "arise out of or are in the course of activity incident to service." 340 U.S. 135, 146 (1950). In so doing, the Court "creat[ed] a judicial exception to the Federal Tort Claims Act's (FTCA's) broad

waiver of sovereign immunity." *Lutz v. Secretary of Air Force*, 944 F.2d 1477, 1480 (9th Cir. 1991). In the half century since the *Feres* decision, the doctrine of intramilitary immunity has been expanded to bar a variety of claims by servicemen against superior officers. In *United States v. Shearer*, 473 U.S. 52, for example, the Court extended the doctrine to bar the FTCA claim of a soldier who was injured, off-base and off-duty, by another soldier. The doctrine was held to bar two *Bivens* actions in *Chappell v. Wallace*, 462 U.S. 296 (1983) and *United States v. Stanley*, 483 U.S. 669, and several Courts of Appeals, including this court, have held that intramilitary immunity bars suits for damages under 42 U.S.C. § 1983. *See, e.g., Jones v. N.Y. State Div. of Military & Naval Affairs*, 166 F.3d 45, 51-52 (2d Cir. 1999); *Wright v. Park*, 5 F.3d 586, 591 (1st Cir. 1993); *Crawford v. Tex. Army Nat'l Guard*, 794 F.2d 1034, 1036 (5th Cir. 1986); *Jorden v. Nat'l Guard Bureau*, 799 F.2d 99, 104-08 (3d Cir. 1986); *Brown v. United States*, 739 F.2d 362, 367 (8th Cir. 1984); *Martelon v. Temple*, 747 F.2d 1348, 1350-51 (10th Cir. 1984). National Guardsmen have been similarly barred, under the *Feres* doctrine, from suing superior officers for damages. *See, e.g., Jones*, 166 F.3d at 50-51.

The hesitation to entertain intramilitary lawsuits is most often justified with reference to the "peculiar and special relationship of the soldier to his superiors [and] the effects of the maintenance of such suits on discipline." *United States v. Brown*, 348 U.S. 110, 112 (1954). The Supreme Court has repeatedly counseled that "civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment."

Chappell, 462 U.S. at 300. Moreover, the Constitution's "explicit grant of plenary authority to Congress" to regulate the military counsels against court interference with military decisionmaking. *Id.* at 301. As the Supreme Court wrote in *Orloff v. Willoughby*, 345 U.S. 83 (1953),

> [J]udges are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Id. at 93-94.

The scope of the intramilitary immunity doctrine is not precisely defined. While it is clear that military personnel may not sue superior officers for damages, it is also clear that the military's freedom from suits brought by servicemembers is not absolute. As the *Chappell* Court noted, "military personnel are [not] barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." 462 U.S. at 304. Indeed, the *Chappell* opinion pointed to a number of cases in which the Supreme Court entertained constitutional and statutory challenges to military regulations. *See Brown v. Glines*, 444 U.S. 348 (1980) (challenge to Air Force rules requiring servicemembers to obtain approval from their commanders before circulating petitions on Air Force bases)); *Parker v. Levy*, 417 U.S. 733 (1974) (challenge to the articles of

Uniform Code of Military Justice); *Frontiero v. Richardson*, 411 U.S. 677, (1973) (challenge to statutes establishing differential benefits for male and female spouses of military personnel).

The line between justiciable and nonjusticiable intramilitary suits has never been precisely defined by the Supreme Court. In *United States v. Stanley*, the Court noted that the cases cited in *Chappell* as examples of justiciable intramilitary suits were all ones in which the plaintiff was seeking "redress designed to halt or prevent . . . constitutional violation[s] rather than the award of money damages." *Stanley*, 483 U.S. at 683. Dibble urges this court to read *Stanley* as meaning that all intramilitary claims for equitable relief, as opposed to money damages (at least where constitutional violations are alleged), are justiciable. Defendant argues that although some equitable suits are allowed in appropriate circumstances, *any* suit in which a "civilian court [is asked] to second-guess military decisions"—particularly personnel decisions—is barred, lest it "impair essential military discipline." *Shearer*, 473 U.S. at 57.

The parties' arguments highlight a disagreement among our sister circuits regarding the justiciability of claims by members of the National Guard and the active military who seek equitable relief for alleged constitutional violations in personnel decisions. The Fifth, Seventh, Eighth, Ninth, and D.C. Circuits have characterized the governing rule as allowing equitable challenges to personnel decisions only when they constitute facial challenges to the constitutionality of military regulations, and not in cases of discrete individualized actions. *See Knutson v. Wisc. Air Nat'l Guard*, 995 F.2d 765 (7th Cir. 1993); *Watson v. Ark. Nat'l Guard*, 886 F.2d 1004 (8th Cir. 1989); *Kreis v. Sec'y*

of the Air Force, 866 F.2d 1508 (D.C. Cir. 1989); *Christoffersen v. Wash. State Air Nat'l Guard*, 855 F.2d 1437 (9th Cir. 1988); *Crawford v. Tex. Army Nat'l Guard*, 794 F.2d 1034 (5th Cir. 1986). The First, Third, and Tenth Circuits, in contrast, have entertained equitable actions protesting military personnel decisions that were not facial challenges to the constitutionality of a military regulation. *See Wigginton v. Centracchio*, 205 F.3d 504 (1st Cir. 2000); *Jorden v. Nat'l Guard Bureau*, 799 F.2d 99 (3d Cir. 1986); *Walden v. Bartlett*, 840 F.2d 771 (10th Cir. 1988). These disparate outcomes reflect a split in the lower courts' understanding of *Stanley* and *Chappell*.

The First Circuit decision in *Wiggington* and the Third Circuit decision in *Jorden* directly embrace the position advanced by Dibble in this case: that the Supreme Court's observations in *Chappell* and *Stanley* regarding the justiciability of certain intramilitary claims "leave[] open claims for injunctive relief against the military." *Jorden*, 799 F.2d at 109. As the Third Circuit wrote in *Jorden*,

> *Chappell* stated that it was not closing the door on claims against the military for constitutional violations, and cited as examples of viable actions three cases—*Brown, Frontiero*, and *Parker*—that involved . . . facial constitutional challenges to regulations or statutes concerning the military. However, the Court in *Brown* expressly stated that judicial scrutiny was not limited to facial constitutional challenges; rather, legitimate constitutional claims could arise from the application of these statutes and regulations.

Id.

The *Jorden* decision justifies this position further by reference to the underlying rationale of *Feres* and *Chappell*:

> One of the concerns underlying *Chappell* is the need for military officers' uninhibited decisionmaking, and the threat to such decisionmaking if officers fear personal liability. The threat of personal liability for damages poses a unique deterrent to vigorous decisionmaking. *See generally*, P. Schuck, Suing Government (1983). On the other hand, the possibility that an officer may be compelled by a court to cease applying a particular regulation in an arbitrary manner, or to reinstate an improperly discharged soldier, poses much less of a threat to vigorous decisionmaking.

Id. at 110.

Other courts of appeals have read *Stanley* and *Chappell* differently. For example, the Fifth Circuit, in *Crawford*, proposed a distinction between constitutional challenges to military regulations (which the court held to be justiciable) and challenges to military personnel decisions (which the court held were nonjusticiable). Responding to the suggestion that all intramilitary suits for injunctive relief are justiciable under *Chappell* and *Stanley*, the court noted that

> the common characteristic of [the Supreme Court decisions allowing constitutional claims against the military] is that they involve challenges to the facial validity of military regulations and were not tied to discrete personnel matters. The nature of the lawsuits, rather than the relief sought, rendered them justiciable. The injunctive-relief exception to

> *Chappell* advocated by appellants could swallow *Chappell*'s rule of deference.

Crawford, 794 F.2d at 1036. The Seventh and Eighth Circuits have adopted this logic as well, both holding that challenges by servicemembers to military personnel decisions are ordinarily nonjusticiable, unless they involve facial challenges to the constitutionality of statutes or military regulations. *See Knutson*, 995 F.2d at 771; *Watson*, 886 F.2d at 1008-10. As the Eighth Circuit explained,

> [T]he Court has entertained, on numerous occasions, suits involving facial constitutional challenges to military regulations or statutes. . . .
>
> There is a vast difference between judicial review of the constitutionality of a regulation or statute of general applicability and judicial review of a discrete military personnel decision. In the first instance, a legal analysis is required; one which courts are uniquely qualified to perform. The second involves a fact-specific inquiry into an area affecting military order and discipline and implicating all the concerns on which *Feres* and *Chappell* are premised.

Watson, 886 F.2d at 1010 (internal citations omitted).

We find this reasoning more persuasive. First, we do not believe that *Chappell* and *Stanley* unambiguously indicate that *all* injunctive claims by servicemembers against their superiors are justiciable. Rather, we agree with the Fifth Circuit that "the nature of the [intramilitary] lawsuits [found justiciable by the Supreme Court], rather than the relief sought, rendered them justiciable." *Crawford*, 794 F.2d at 1036. Second, given the ambiguity

that *Stanley* and *Chappell* present, we do not agree with the Third Circuit's policy judgment that injunctive suits as a class necessarily involve a negligible risk of improper interference with military decisionmaking and discipline. While it may be true, in certain circumstances, that the prospect of an injunction would present less of a "threat to vigorous decisionmaking," *Jorden*, 799 F.2d at 110, than would the prospect of monetary damages, we do not believe that the threat is necessarily negligible. We have previously noted that "the risk of improper judicial interference with military functioning is not abated 'merely because the remedy sought is an injunction rather than damages.'" *Jones*, 166 F.3d at 52 (quoting *Watson*, 886 F.2d at 1009). Moreover, even if officers faced with the prospect of judicial interference would nonetheless feel free to make command decisions, the availability of injunctive relief from a civilian court would undoubtedly affect military discipline. Suits by enlisted soldiers bypassing the hierarchy of the armed services seeking injunctions to overturn personnel decisions of their superiors in civilian courts could substantially alter and interfere with the "peculiar and special relationship of the soldier to his superiors." *Brown*, 348 U.S. at 112.

Our holding does not mean that *all* military personnel decisions are nonjusticiable under the doctrine of intramilitary immunity. As we have noted previously, "the rule of non-justiciability of discretionary military decisions is not absolute." *Jones*, 166 F.3d at 52. For example, "where the military has failed to follow its own mandatory regulations in a manner substantially prejudicing a service member," we will entertain a suit seeking redress of the prejudice. *Id.* (citing *Blassingame v. Sec'y of the Navy*, 866 F.2d 556, 559-60 (2d Cir. 1989); *Ornato v. Hoffman*, 546 F.2d 10, 13 (2d Cir. 1976); *Crawford v. Cushman*, 531 F.2d

1114, 1120 (2d Cir. 1976)). We decline to adopt a categorical rule on the justiciability of intramilitary suits.

Dibble does not allege that the Guard failed to follow its own procedures when it discharged him from service. Indeed, Dibble has availed himself of the full range of federal intramilitary remedies by pursuing his claim for reinstatement and correction of records not only in this forum, but with the Air Force Board for the Correction of Military Records. For the district court to find that the Guard violated Dibble's constitutional rights by discharging him, it would be forced to make a particularized inquiry into the mindset of his superior officers, determining whether their various disciplinary actions were motivated by proper military concerns or by the unconstitutional desire to stifle Dibble's protected First Amendment activity. Especially considering the availability of intramilitary review in cases such as this, we decline to insert the federal courts into military decisionmaking in such an intrusive manner.

CONCLUSION

The order of the district court denying defendant's motion to dismiss is REVERSED, and the case is REMANDED with instructions to dismiss.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DONALD J. DIBBLE,

Plaintiff,

-against-

97-CV-1256
(LEK/RWS)

Major General JOHN H. FENIMORE, V;
Secretary of the Air Force F. WHITTEN PETERS,

Defendants.

APPEARANCES:

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LAWRENCE E. KAHN
District Judge

MEMORANDUM-DECISION AND ORDER

I. Background

Plaintiff Donald J. Dibble was a federal excepted service technician who was employed under 32 U.S.C. § 709 by the New York Air National Guard ("Air Guard" or "NYANG"). He was also a steward for his union at Stewart Air National Guard Base, the Association of Civilian Technicians, which has a collective bargaining agreement with the Air Guard. Although he was a federal civilian employee, § 709(b) required that he maintain military

membership in the Air Guard as a condition of this employment. At the end of his enlistment period in 1994 the Air Guard denied his request to reenlist. He was honorably discharged 8 October 1994, and at that time was automatically separated from his civilian technician employment.

Plaintiff claims that the Air Guard wrongfully denied his request to reenlist in retaliation for his union activities, and in violation of his statutory and constitutional rights. (Decl. Daniel M. Schember at 2, ¶ 1 (Doc. 40, 19 Oct. 1998).) Plaintiff further asserts that "[t]he stated reason for the reenlistment denial was . . . 'performance in a military capacity.' [Plaintiff] was not accused of 'misconduct or delinquency.'" (Id. at 3, ¶ 2.) Defendants, in contrast, assert that he was denied reenlistment because of incidents of misconduct. (Def.'s Mot. Dismiss, or for Summ. J. at 13-14 (Doc. 37, 19 Oct. 1998).)

II. Procedural Posture

In October 1994, Plaintiff asked the Inspector General of the New York National Guard to investigate his reenlistment denial. In April 1995 the Inspector General upheld the Air Guard's action. In December 1995 Plaintiff asked the Inspector General to reconsider his decision; the Inspector General responded that Plaintiff could apply to the Air Force Board for Correction of Military Records ("AFBCMR," or "Correction Board") for a correction of his military record. Plaintiff did so. The Correction Board denied his application on 28 Oct. 1997. (See Admin. R. (hereinafter "A.R.") at 1-2 (Attach. 1 to Doc. 37).)

Plaintiff filed this action 26 August 1997, pursuant to 5 U.S.C. § 706, 10 U.S.C. § 1552, 32 U.S.C. § 709 and 42

U.S.C. § 1983. The Court has jurisdiction under 28 U.S.C. §§ 1331and 1343(a)(3) and (4). Plaintiff seeks (1) a determination that the 1994 denial of reenlistment, with consequent loss of civilian employment, was unlawful, (2) a determination that the 1997 refusal to reenlist s him in his former unit was unlawful, and (3) equitable relief correcting his employment and military records to show that he was not denied reenlistment in 1994, that he was not separated from his civilian employment, and that he has continued to serve to the present, without interruption, in both his military and civilian employment capacities. (See Decl. Daniel M. Schember at 4, ¶ 6.)

III. Motions

Now before the Court are several dispositive motions. Secretary of the Air Force F. Whitten Peters ("Federal Defendant") has moved to dismiss the complaint, or, in the alternative, for summary judgment. (See Notice of Mot. (Doc. 35, 19 Oct. 1998).) Plaintiff has made a cross motion for partial summary judgment (see Notice of Pl.'s Cross Mot. Partial Summ. J. (Doc. 39, 19 Oct. 1998), requesting that the Court

> find the [Correction] Board's decision [to deny Plaintiff's application] to be arbitrary and capricious and to award the relief that is appropriate at this time—remand to the Board for proper inquiry, reconsideration, and issuance of proper findings and reasons.

(Pl.s Mem. Law Supp'ing Pl.'s Opp'n to Def.'s Mot. Dismiss, or for Summ. J. and Supp'ing Pl's Cross Mot. Partial Summ. J. (hereinafter "Cross Mot. Mem.") at 3 (Doc. 41, 19 Oct. 1998).) New York Air National Guard Major General John H. Fenimore V ("State Defendant")

moves to dismiss the complaint on the grounds that (1) Plaintiff has failed to exhaust the available administrative remedies under New York State Military Law, and (2) "the issue he presents is a nonjusticiable discretionary military matter." (Mem. Law Supp. State Def.'s Mot. Dismiss Compl. (hereinafter "State Def.'s Mem.") at 1 (Doc. 49, 2 Dec. 1998).) The State Defendant also joins the arguments of the Federal Defendant in his motion to dismiss.

A. Standards of Decision

1. Dismissal

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In assessing the sufficiency of a pleading, "all factual allegations in the complaint must be taken as true," LaBounty v. Adler, 933 F.2d 121, 123 (2d Cir. 1991), and all reasonable inferences must be construed in favor of the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1099 (2d Cir. 1988), cert. denied sub nom., Soifer v. Bankers Trust Co., 490 U.S. 1007 (1989).

> [C]onsideration is limited to the factual allegations in [the] complaint, to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit.

Brass v. American Film Technologies, Inc., 987 F.2d 142, 150 (2d Cir. 1993).

The Rules do not require the plaintiff to set out in detail the facts upon which the claim is based, but only that a defendant be given "fair notice of what the claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Individual allegations, however, that are so baldly conclusory that they fail to give notice of the basic events and circumstances of which the plaintiff complains are meaningless as a practical matter and, as a matter of law, insufficient to state a claim. Barr v. Abrams, 810 F.2d 358, 363 (2d Cir. 1987).

2. Summary Judgment

Summary judgment must be granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Lang v. Retirement Living Pub. Co., 949 F.2d 576, 580 (2d Cir. 1991). The moving party carries the initial burden of demonstrating an absence of a genuine issue of material fact. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Thompson v. Gjivoje, 896 F.2d 716, 720 (2d Cir. 1990). Facts, inferences therefrom, and ambiguities must be viewed in a light most favorable to the nonmovant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Project Release v. Prevost, 722 F.2d 960, 968 (2d Cir. 1983). A genuine issue is an issue that, if resolved in favor of the non-moving party, would permit a jury to return a verdict for that party. R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 57 (2d Cir. 1997) (citing Anderson, 477 U.S. at 248).

When the moving party has met the burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., 475 U.S. at 586. At that point, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56; Liberty Lobby Inc., 477 U.S. at 250; Matsushita Elec. Indus. Co., 475 U.S. at 587. To withstand a summary judgment motion, evidence must exist upon which a reasonable jury could return a verdict for the nonmovant. Liberty Lobby, Inc., 477 U.S. at 248-49; Matsushita Elec. Indus. Co., 475 U.S. at 587. Thus, summary judgment is proper where there is "little or no evidence . . . in support of the non-moving party's case." Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1223-24 (2d Cir. 1994) (citations omitted).

The Court addresses the motions on the basis of these standards.

IV. Discussion

A. Federal Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment

Federal Defendant argues that the Court should dismiss the complaint because it lacks jurisdiction over Plaintiff's eligibility to reenlist and the disposition of his application for reenlistment, which Defendant asserts are nonjusticiable military matters. (Def.'s Mot. Dismiss, or Summ. J. at 2.) In so arguing, however, Defendant misapprehends the gravamen of the complaint, which focuses not on the initial denial of reenlistment, but on the reasonableness of the Correction Board's review of that action. Notwithstanding Defendant's arguments, decisions of the Correction Board

"are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." Chappell v. Wallace, 462 U.S. 296, 303 (1983).

The Court has, in addition, reservations about the categorical scope of Federal Defendant's argument that discretionary decisions by military officials are not subject to judicial review despite Constitutional or statutory guarantees of rights (Def.'s Mot. Dismiss, or Summ. J. at 4-7 & n.4). The logical conclusion of applying that argument to all conceivable cases would be that a military official could engage in unlawful discrimination or retaliation against a protected person, and need only make sure that the adverse action falls in a category characterized as "discretionary" or "internal" to avoid any risk of the unlawful act—no matter how egregious—being reviewed in court. Indeed, by definition an act of discrimination must, at some stage, stem from a discretionary act. The meaning of "discrimination" is, at its most elemental, inextricably linked with choice. There is by definition no choice in a nondiscretionary act. Therefore, by itself, a nondiscretionary act could never give rise to a claim of discrimination.[1] The Court will not conclude that Congress would have provided that protected persons should have certain rights, but left those persons without recourse under law for adjudicating violations of their rights.

For the foregoing reasons, the Court must DENY Federal Defendant's motion to dismiss the complaint.

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[1] The Court recognizes, of course, that discretionary acts with discriminatory purpose—for example, the passage of discriminatory legislation—can give rise to nominally nondiscretionary acts that in fact carry out the discriminatory purpose.

With respect to Federal Defendant's summary judgment argument, the fundamental question is whether there is a genuine issue of material fact that would support a conclusion that, pursuant to the provisions of the Administrative Procedure Act, the Correction Board's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See 5 U.S.C. § 706(2)(A). The decision of an administrative agency is "arbitrary and capricious" if that body "relied on factors [that] Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

In at least one respect, there is an issue of material fact that bears on whether the Correction Board offers an explanation for its decision that runs counter to the evidence before it. The Correction Board relied on the Air Force advisory opinion in denying Plaintiff's application. (See A.R. at 2.) The advisory opinion, submitted by Lt. Col. Nilda E. Urrutia, U.S.A.F., concluded that a series of "minor infractions" from 1990 to 1994 "form[ed] a legally sufficient basis for discharging SSgt Dibble for unsuitability for further military service." (Id. at 488-89.) In its next paragraph, however, the advisory opinion notes that on 14 December 1995 the Air Guard corrected Plaintiff's Report of Separation and Record of Service to read that he is "eligible" to reenlist in the Air Guard. (See id. at 489-90.) Defendant has offered no explanation of how someone who is "unsuitab[le] for further military service" could at the same time be "eligible to reenlist in the NY ANG." Nor is any cogent rationale readily apparent to the Court. Because the Correction Board's explanation of its decision

runs counter to this evidence—indeed, it appears wholly irreconcilable with it—the Court must DENY Federal Defendant's motion for summary judgment.

B. State Defendant's Motion to Dismiss

State Defendant argues that Plaintiff's complaint must be dismissed because he has failed to exhaust his administrative remedies. (See State Def.'s Mem. at 9-11.) The general rule under §1983, that a plaintiff is not required to exhaust administrative remedies, does not apply to a suit arising from the failure of a military service to follow its own regulations, where "[t]he exhaustion requirement is contained in the very regulations that plaintiff seeks to have enforced." Jones v. New York State Div. of Mil. and Naval Aff., 166 F.3d 45, 54-55 (2d Cir. 1998). The Court has, however, found no exhaustion requirement in any regulation Plaintiff seeks to have enforced; State Defendant has pointed out none. State Defendant's "exhaustion of administrative remedies" argument is thus unavailing.

State Defendant further asserts that Plaintiff's complaint must be dismissed because he seeks relief on a military personnel issue that is non-justiciable. For substantially the same reasons detailed above in the discussion of Federal Defendant's motion to dismiss, the Court finds that Plaintiff's claims are justiciable. Accordingly, the Court must DENY State Defendant's motion to dismiss.

C. Plaintiff's Cross Motion for Partial Summary Judgment

1. Northern District Motion Practice

Local Rule 7.1(a)3 (formerly 7.1(f)) requires that the party opposing a motion for summary judgment shall file a response to the moving party's Statement of Material Facts. That response

> shall mirror the movant's Statement . . . by admitting and/or denying each of the movant's assertions in matching numbered paragraphs. Each denial shall set forth a specific citation to the record where the factual issue arises . . . . Any facts set forth in the Statement of Material Facts shall be deemed admitted unless specifically controverted by the opposing party.

In his cross motion for partial summary judgment, Plaintiff submitted a Rule 7.1(a)3 statement under the title Pl.'s Statement of Material, Genuinely-Disputed Facts and Material Facts as to Which There is No Genuine Issue (hereinafter "Pl.'s 7.1(a)3 Statement"), attached to Cross Mot. Mem. (Doc. 41). Plaintiff's statement in part responded, as required under the Local Rule, to Federal Defendant's 7.1(a)3 Statement of Material Facts Not at Issue (Doc. 36, 19 Oct. 1998). (See Pl.'s 7.1(a)3 Statement at 3-5.) Then, in accordance with L.R. 7.1(a)3, as part of his cross motion for summary judgment, Plaintiff further set forth a statement of material facts as to which he contends there is no genuine issue. (Id. at 5-8.)

In response to the cross motion's 7.1(a)3 statement, neither Federal Defendant nor State Defendant submitted a 7.1(a)3 statement. The Defendants thus failed to comply

with L.R. 7.1(a)3's requirement that each submit a response that "mirror[s] the movant's Statement of Material Facts by admitting and/or denying each of the movant's assertions in matching numbered paragraphs." Because Defendants have not met this obligation to controvert with specificity the facts set forth in Plaintiff's statement, the Court in accordance with L.R. 7.1(a)3 will deem admitted as uncontroverted all the facts set forth in Pl.'s 7.1(a)3 Statement at 5-8.

Among these admitted uncontroverted facts are that Plaintiff's submissions to the Correction Board "presented evidence and argument supporting his claims that" (1) his Air Guard superiors were hostile toward him because of his union activities, (2) these superiors punished Plaintiff, but not other Air Guard members, for minor transgressions, (3) these superiors sought to suspend Plaintiff for purported misconduct that was far less serious than misconduct by other Air Guard members that they ignored, (4) these superiors wanted to retaliate against Plaintiff because he defeated their attempt to suspend him, (5) these superiors denied Plaintiff reenlistment in the Air Guard, and thus terminated his employment, for pretextual reasons that would apply to many Air Guard members who were not denied reenlistment—pretextual reasons that were "far less significant than misconduct by others" who were not barred from reenlistment—and (6) these superiors denied Plaintiff reenlistment in retaliation for his exercise of statutory and Constitutional rights related to his union, workplace, and Air Guard activities. (See id. at 5-6.)

Also admitted as uncontroverted is that Plaintiff demonstrated that he had requested, but not received, records from the Air Guard relating to performance evaluations, decisions to grant or deny reenlistment, and

union activities, of other members of his Air Guard unit; that the Correction Board neither requested nor obtained such records, nor did it address the Air Guard's failure to provide those records to Plaintiff; that he requested that the Correction Board obtain information relating to the relief from command of "the officer principally responsible for denying" Plaintiff's reenlistment, but that the Correction Board did not obtain this information; that the Correction Board based its decision to deny Plaintiff's application "solely on the 'facts and opinions stated in the advisory opinion'," but that neither the advisory opinion nor the decision explained the apparently unreconcilable conclusions that while a series of minor infractions made the Plaintiff "unsuitable for further military service," he was nonetheless eligible to reenlist in the Air Guard; and that the advisory opinion and decision failed to address any of the evidence supporting, or make any findings regarding, Plaintiff's contentions as detailed in the points numbered (1) through (5) in the paragraph immediately above this one. (See id. at 6-8.)

2. Application of Facts and Standards to Cross Motion

A court that reviews an agency decision must be deferential to the agency's expertise and ultimate substantive decision, but it also must require "that the agency exercise its discretion in a reasoned manner." Kreis v. Secretary of the Air Force, 866 F.2d 1508, 1512 (D.C. Cir. 1989). An agency fails to exercise its discretion in a reasoned manner if, pursuant to the provisions of the Administrative Procedure Act, its decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See 5 U.S.C. § 706(2)(A). An agency decision is "arbitrary and capricious" if the agency

"relied on factors [that] Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43. As with other agencies, decisions of the Correction Board "are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." Chappell, 462 U.S. at 303.

As detailed above, the uncontroverted facts show that the Correction Board had before it specific allegations that Air Guard authorities directed bias, animus and inequitable treatment against the Plaintiff. The uncontroverted fact that the Air Guard deems Plaintiff eligible to reenlist renders highly suspect the conclusion that a series of admittedly minor infractions made Plaintiff "unsuitable" for military service. In view of this, it was not reasonable for the Correction Board to "entirely fail[] to consider an important aspect of the problem." 463 U.S. at 43. The uncontroverted facts are that the Correction Board did not make certain records available to the Plaintiff or obtain that information for its own review. That information could be relevant to Plaintiff's allegations that his superiors' bias or desire to retaliate against him led them to deny his reenlistment on pretextual grounds. That, in turn, could explain the inconsistency of a person deemed eligible for reenlistment being found at the same time to be "unsuitable" for further military service. Accordingly, the Correction Board's failure to consider an important aspect of the matter before it is substantively linked to "an explanation for its decision that runs counter to the evidence before [it]." Id.

Because there is no genuine issue of material fact adverse to Plaintiff's contention that the Correction Board's

decision was arbitrary and capricious, Plaintiff is entitled as a matter of law to partial summary judgment on his cross motion, and the Court GRANTS his motion for partial summary judgment. Pursuant to 5 U.S.C. § 706, the Court remands the case to the Correction Board for proper inquiry, consideration, findings, and reasons. The Correction Board will obtain, and make available to Plaintiff, any evidence relevant to assertions that Plaintiff's Air Guard superiors were hostile toward him because of his union activities or that they desired to retaliate against him because he defeated their attempt to suspend him. The Correction Board will also obtain and make available to Plaintiff records of members of his Air Guard unit who have in a relevant time period been granted or denied reenlistment, with respect to (1) their "performance in a military capacity," (2) the bases for the decisions to grant or deny them reenlistment, and (3) in each case whether the Air Guard member was also employed as a technician and had ever served as a union official.

Specifically excluded from this order is information or documents pertaining to the relieving of command of Major John J. Birmingham, to any misconduct or unsatisfactory duty performance by him, or to any investigation of alleged misconduct or unsatisfactory duty performance by him. Plaintiff requested production of these documents earlier in these proceedings. Defendants submitted the documents in question for in camera review by the Honorable Ralph W. Smith, Jr., United States Magistrate Judge. After careful examination of the documents, Magistrate Judge Smith concluded "that there is nothing contained therein [that] would be in any way relevant or calculated to lead to the discovery of admissible evidence. . . ." (Order at 3 (Doc. 56, 7 Dec. 1998).) Whether to obtain

those documents for review is accordingly left to the discretion of the Correction Board.

The Court directs the Correction Board to address these issues:

> (1) Whether Plaintiff's Air Guard superiors were hostile toward him because of his past union activities;
>
> (2) Whether Plaintiff's Air Guard superiors punished Plaintiff, but not other Air Guard members, for minor transgressions;
>
> (3) Whether Plaintiff's Air Guard superiors sought to suspend Plaintiff for purported misconduct that was far less serious than misconduct by other Air Guard members that they ignored;
>
> (4) Whether Plaintiff's Air Guard superiors desired to retaliate against Plaintiff because he defeated their attempt to suspend him; and
>
> (5) Whether Plaintiff's Air Guard superiors denied Plaintiff reenlistment in the Air Guard, and thus terminated his employment, for pretextual reasons that would apply to many Air Guard members who were not denied reenlistment—pretextual reasons that were "far less significant than misconduct by others" who were not barred from reenlistment.

The Court further directs the Correction Board to make specific and numbered findings of fact, and conclusions of law based on such factual findings, on each of Plaintiff's claims as detailed herein. The Correction Board shall take care to enunciate a reason for its decision that the Court can measure against the "arbitrary and capricious" standard of

the A.P.A., see Kreis, 866 F.2d at 1514-15, and to offer an explanation for its decision that does not run counter to the evidence before it, Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43—most notably, to the evidence that the Air Guard has found Plaintiff eligible for reenlistment.

CONCLUSION

For the reasons stated above, it is hereby:
ORDERED that Federal Defendant's motion to dismiss the complaint, or, in the alternative, for summary judgment against Plaintiff, is **DENIED;** and

IT IS FURTHER ORDERED that State Defendant's motion to dismiss the complaint is **DENIED;** and

IT IS FURTHER ORDERED that Plaintiff's cross motion for partial summary judgment is **GRANTED;** and

IT IS FURTHER ORDERED that this case is **REMANDED to the Correction Board** for proper inquiry, reconsideration, and issuance of proper findings and reasons, in accordance with the directions specified herein; and

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this order by regular mail upon the parties to this action.

IT IS SO ORDERED.

DATED: 19 January 2000
Albany, New York

/s/
HONORABLE LAWRENCE E. KAHN
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DONALD J. DIBBLE,

Plaintiff,

-against-

97-CV-1256
(LEK/RWS)

Major General JOHN H. FENIMORE, V;
Secretary of the Air Force F. WHITTEN PETERS,

Defendants.

APPEARANCES:

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JAMES C. WOODS, Esq.
Assistant U.S. Attorney

LAWRENCE E. KAHN
District Judge

MEMORANDUM-DECISION AND ORDER

Plaintiff Donald J. Dibble claims in this action that his former employer, the New York Air National Guard ("Air Guard"), wrongfully denied his request to reenlist in 1994, and thereby compelled the termination of his employment as a service technician with the Air Guard, in retaliation for his activities as a union steward for the Association of Civilian Technicians, and in violation of his statutory and constitutional rights. (Decl. Daniel M. Schember at 2, ¶ 1 (Doc. 40, 19 Oct. 1998).) Although he was a federal civilian employee, 32 U.S.C. § 709(b) required that he maintain military membership in the Air Guard as a condition of this employment.

On 19 January 2000 this Court denied Secretary of the Air Force F. Whitten Peters's ("Federal Defendant") motion to dismiss the complaint, or, in the alternative, for summary judgment against Plaintiff; denied Major General John H. Fenimore, V's (State Defendant) motion to dismiss the complaint; granted Plaintiff's cross motion for partial summary judgment; and remanded the case to the Air Force Board for Correction of Military Records ("Correction Board") for proper inquiry, reconsideration, and issuance of proper findings and reasons, in accordance with the directions specified in the Court's decision. (See Memorandum-Decision and Order at 15 (Doc. 59).)

Now before the Court is State Defendant's motion for reconsideration of the Court's denial of his motion to dismiss the complaint. (See Notice Mot. Recons. (Doc. 60, 31 Jan. 2000); Bruce J. Boivin Decl. at 3 ¶ 16 (Doc. 61, 31 Jan. 2000).)

I. Standard of Review for Motions for Reconsideration

Motions for reconsideration proceed in the Northern District of New York under Local Rule 7.1(g), unless otherwise governed by Federal Rule of Civil Procedure 60. The "clearly erroneous" standard of review applies to motions for reconsideration. The moving party must "point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995) (Calabresi, J.). Generally, the prevailing rule in the Northern District "recognizes only three possible grounds upon which motions for reconsideration may be granted; they are (1) an intervening change in controlling law, (2) the availability of new evidence not previously available, or

(3) the need to correct a clear error of law or prevent manifest injustice." In re C-TC 9th Ave. Partnership, 182 B.R. 1, 3 (N.D.N.Y. 1995) (McAvoy, C.J.).

In the present case, State Defendant does not contend that the first ground, an intervening change in controlling law, applies. Nor does he contend that the second ground, the availability of new evidence not previously available, applies. Defendant is instead arguing on the basis of the third ground, that his motion for reconsideration should be granted in order to correct a clear error of law or prevent a manifest injustice.

This is a demanding standard.

> It is not enough . . . that [the moving party] could now make a more persuasive argument . . . . "[M]ere doubt on our part is not enough to open [up] the point for full reconsideration." The law of the case will be disregarded only when the court has "a clear conviction of error" with respect to a point of law on which its previous decision was predicated.

Fogel v. Chestnutt, 668 F.2d 100, 109 (2d Cir. 1981) (Friendly, J.) (citations omitted) (quoting White v. Higgins, 116 F.2d 312, 317 (1st Cir. 1940), and Zdanok v. Glidden Co., 327 F.2d 944, 953 (2d Cir. 1964) (Friendly, J.)). A simple difference of opinion, no matter how deep it runs, will not warrant reconsideration. "[A]ny litigant considering bringing a motion for reconsideration must evaluate whether what may seem to be a clear error of law is in fact simply a point of disagreement between the Court and the litigant." In re C-TC 9th Ave. Partnership, 182 B.R. at 3.

II. Discussion

A review of this Court's 19 January 2000 Memorandum-Decision and Order, the Boivin Declaration, the State Defendant's memorandum of law supporting the motion for reconsideration (Doc. 62, 31 Jan. 2000), and the Plaintiff's memorandum of law in opposition to the motion for reconsideration (Doc. 67, 18 Feb. 2000), reveals a great deal of dispute, but no clear error. Notably, even if the Court were to accept Defendant's arguments regarding the applicability of a requirement to exhaust State administrative remedies, the record indicates that Plaintiff was indeed pursuing State administrative appeals when the State's Acting Inspector General for the Air Force National Guard diverted his appeals to the federal government's Correction Board. (See letter from. McInerney to Schember of 12/18/95.) Defendant cannot demonstrate that the Court's earlier decision was clearly erroneous with respect to the issue of Plaintiff's exhaustion of State administrative remedies, when a colorable interpretation of the record before the Court is that by adhering to this direction from the State, Plaintiff complied with any requirement to exhaust State administrative appeals. Moreover, it would appear manifestly unjust if the State, having shepherded Plaintiff away from further pursuit of administrative remedies in the State arena, were now to benefit by contending that Plaintiff—by doing as the State asked him to do—had failed to fulfill prerequisites to the pursuit of remedies in federal court.

As cited in State Defendant's memorandum, the Second Circuit has identified one important aspect of a requirement that National Guard members exhaust State administrative appeals to be that the failure to do so deprives the Governor of an opportunity to review the matter, and perhaps

"obviate any need for judicial interference in military affairs." Jones v. New York State Div. of Mil. and Naval Affairs, 166 F.3d 45, 54 (2d Cir. 1998). When the State itself has directed Plaintiff's appeals away from a route that would lead to review by the Governor, then the rationale that the Second Circuit identified for avoiding judicial involvement dissolves.

With respect to justiciability, State Defendant invokes this Court's earlier analysis of the applicability of the test developed in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). See Jones v. New York State Div. of Mil. and Naval Affairs, No. 93- CV-862, 1997 WL 266765 (N.D.N.Y. 7 May 1997) (Kahn, J.). In that case, however, this Court did not conclude that Jones's claims were nonjusticiable per se, but that Jones's failure to exhaust State administrative remedies rendered them nonjusticiable. See id. at *10. That holding is sharply at variance with Defendant's adamant position that Plaintiff's claims are in a realm of nonjusticiable discretionary military decisions. As indicated supra, it is not clear that Plaintiff Dibble did fail to exhaust his State administrative appeals. Defendant's arguments no more reveal clear error with respect to the question of justiciability than they do with respect to the question of the exhaustion of State administrative remedies.

CONCLUSION

For the reasons stated above, it is hereby:

ORDERED that State Defendant's motion for reconsideration of the Court's 19 January 2000 denial of his motion to dismiss the complaint is **DENIED**; and

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this order by regular mail upon the parties to this action.

IT IS SO ORDERED.

DATED: 5 July 2000
Albany, New York

/s/
HONORABLE LAWRENCE E. KAHN
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATED COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES
COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NY 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 24 day of Nov. two thousand three.

Donald J. Dibble,

Plaintiff-Appellee,

v Dkt No: 00-6243

John H. Fenimore,

Defendant-Appellant

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Donald J. Dibble.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE,
Clerk

By: /s/
Arthur M. Heller
Motions Staff Attorney

(3)

Supreme Court, U.S.
FILED
MAR 22 2004
OFFICE OF THE CLERK

No. 03-1184

IN THE

Supreme Court of the United States

DONALD J. DIBBLE,

Petitioner,

v.

JOHN H. FENIMORE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a claim for equitable relief in an action under 42 U.S.C. § 1983 by a former member of the New York Air National Guard against the head of the Guard, based on intra-service personnel decisions allegedly taken by the commanding officer in retaliation for the subordinate's exercise of First Amendment rights, is justiciable.

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STATEMENT OF THE CASE

Petitioner Donald J. Dibble was a federal civilian military technician, *see generally* 32 U.S.C. § 709 (describing duties and qualifications of such positions), whose continued employment was conditioned upon his retaining membership in the National Guard, *see* 32 U.S.C. § 709(b), (f). Thus, when he was denied reenlistment in the Guard by respondent John H. Fenimore, the commander of the New York Air National Guard, his employment was automatically terminated. *Id.*; *see also Tennessee v. Dunlap*, 426 U.S. 312, 313-16 (1976). After his separation from the Guard and consequent loss of employment, he brought this action under 42 U.S.C. § 1983 against respondent, alleging that he had been denied reenlistment in retaliation for his union activities. The complaint also sought relief against the Secretary of the Air Force in connection with the denial of petitioner's application to the United States Air Force Board for Correction of Military Records ("AFBCMR"). That board, which has broad administrative authority to review and correct military records, denied petitioner's request to "correct" his military records to declare that respondent had wrongfully denied petitioner reenlistment.

The district court denied respondent's motion to dismiss on the basis of, *inter alia*, intramilitary immunity. Pet. App. 17a, 26a. The court granted petitioner's cross-motion for partial summary judgment against the Secretary, finding that the decision of the AFBCMR was arbitrary and capricious, and remanded the matter to that board for a new determination. *Id.* at 27a-33a. The district court subsequently denied respondent's motion for reconsideration. *Id.* at 35a.

On respondent's appeal, in which the Secretary took no part, the Court of Appeals for the Second Circuit reversed and remanded with instructions to dismiss as to respondent on the basis of intramilitary immunity. *Id.* at 1a. Dibble's petition for rehearing and suggestion for rehearing en banc was denied. *Id.* at 42a.

REASONS FOR DENYING THE PETITION

I. THE CASE IS NOT FINALLY DECIDED.

Because this lawsuit remains pending against the Secretary in the district court, the case is not finally decided. After the district court remanded the matter to the AFBCMR, the board once again denied petitioner any relief. Following that determination, petitioner and the Secretary filed cross-motions for summary judgment in the district court. Petitioner's motion in the district court seeks to overturn, as arbitrary and capricious under 5 U.S.C. § 706(2)(A)-(E), the AFBCMR's decision on remand on the ground that the board made erroneous findings and misinterpreted the evidence in the administrative record. Specifically, petitioner challenges the AFBCMR's conclusion that he was denied reenlistment in the Guard based on his military performance. United States District Court for the Northern District of New York, Docket No. 97-CV-1256 (LEK), Docket Entry No. 94. The cross-motions remain pending at this time. *Id.*, Docket Entry Nos. 87 & 90.

The fact that this action remains open, and that petitioner's military status and records are thus still very much at issue in the district court, is reason enough not to

grant certiorari at this time. *See generally* Robert L. Stern, *et al.*, SUPREME COURT PRACTICE (7th ed. 1993), § 4.18. After final judgment, petitioner can again seek certiorari to obtain review of the interlocutory proceedings. *Id.*, § 2.2.

II. BECAUSE THE PENDING ACTION MAY PRODUCE THE RELIEF PETITIONER SEEKS, THE CASE IS NOT RIPE FOR REVIEW.

The case is in any event not ripe for this Court's review. If petitioner obtains the relief he seeks against the Secretary -- namely, a declaration that he had been denied reenlistment for impermissible reasons rather than due to military performance, as well as the associated correction of his records -- respondent may agree to reinstate petitioner, thereby eliminating any controversy for this Court to resolve.

To be sure, respondent would not be bound, in his capacity as the head of the New York Air National Guard, by a determination of the AFBCMR or the Secretary (whether acting on their own or pursuant to court order) to restore petitioner's federal status, since the AFBCMR "does not have the power to reinstate a dismissed member of a state national guard." *See Watson v. Arkansas National Guard*, 886 F.2d 1004, 1008 n.11 (8th Cir. 1989). In practice, however, New York generally follows federal National Guard policies. *See* N.Y. Military Law § 262 ("[a]ll matters relating to the organization, discipline and government of the organized militia, not otherwise provided for in this chapter or in regulations issued pursuant thereto, shall be decided by the customs and usage of the appropriate force or forces of the armed forces of the United States"). While respondent respectfully asserts and preserves his right to determine

whether to reinstate petitioner to the New York Air National Guard if petitioner is eventually accorded relief against the Secretary, it would be consistent with general policy and considerations of comity for respondent to do so.

Thus, petitioner's objection to according respondent intramilitary immunity can await final judgment of the claim against the AFBCMR in the courts below. At that point, petitioner may have no need to seek this Court's intervention. And if petitioner fails to obtain relief against the Secretary, he may petition this Court at that time and request review of the judgment in respondent's favor, as well as any judgment in favor of the Secretary. At the very least, by awaiting final judgment, the issues regarding petitioner's military status, both state and federal, will be presented more concretely and completely.

III. PETITIONER EXAGGERATES THE CONFLICT AMONG THE CIRCUITS REGARDING THE SCOPE OF INTRAMILITARY IMMUNITY.

In support of his petition for certiorari, petitioner overstates the conflict among the circuits regarding the scope of intramilitary immunity, particularly as applied to military personnel decisions. The decision of the Second Circuit is entirely consistent with the decisions of this Court, and the few circuit court decisions favoring petitioner's view of the law are incorrect.

As this Court has recognized, life in the military is not comparable to civilian employment. Because it is "'the primary business of armies and navies to fight or be ready to fight wars should the occasion arise,' . . . the military must insist upon a respect for duty and a discipline without

counterpart in civilian life." *See Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975) (*quoting Toth v. Quarles*, 350 U.S. 11, 17 (1955)). The right of command and the corollary duty of unquestioned obedience are vital aspects of military authority. *See In re Grimley*, 137 U.S. 147, 153 (1890).

This Court, cognizant of the importance of national defense and of the role that effective chains of command play in military activities, has been extremely reluctant to permit the courts, in the guise of redressing claims of discrimination in the military, to assume "the task of running the Army." *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953). In *Orloff*, an Army solider, dissatisfied with his assignment as a medical laboratory technician (a job that he claimed was given to him as a result of his refusal to take an anti-Communist oath), asked the courts to order either his reassignment to duties as a physician and psychiatrist with a commensurate rank as a commissioned officer, or his release and discharge from the military. *Id.* at 85-86. His claim for injunctive relief was bolstered by the Government's concession in this Court that soldiers who were inducted into the armed services under a statutory scheme that made physicians (like him) draft-eligible, although they otherwise would have been too old, were entitled to duties generally within a doctor's field of practice. *Id.* at 87-88.

While this Court was cognizant that discrimination in military assignments was a complaint "often made," it concluded that some uneven treatment is "unavoidable in the Army" because "[s]ome must be assigned to dangerous missions; others find soft spots." *Id.* at 93-94. This Court held that the courts were not the proper forum in which to air such grievances because Congress and the Executive branch had created channels within the military to resolve

such matters. Therefore, this Court instructed that "[o]rderly government requires that the judiciary be . . . scrupulous not to interfere with legitimate Army matters." *Id.* at 94.

Those principles of deference to military judgments and related considerations of separation of powers have formed the basis of intramilitary immunity decisions barring suits challenging disciplinary or personnel decisions. To permit such suits would substantially undermine the effectiveness of those in military command. *See Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977) (trials would inquire into the validity of military command decisions, inevitably second-guessing military orders and requiring members of the armed forces to testify as to the propriety of other officers' decisions and actions); *United States v. Shearer*, 473 U.S. 52, 58-59 (1985) (a suit that depends upon faulting officers' supervision and discipline of subordinates would impair military authority). Even to permit such suits to proceed would force commanding officers "to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether or how to place restraints on a solider's off-base conduct." *Shearer*, 473 U.S. at 58.

Those principles were held in *Chappell v. Wallace*, 462 U.S. 296 (1983), to bar a discrimination suit. The plaintiff claimed that he was disciplined more severely than other sailors, was given less desirable work assignments, and was otherwise treated unfairly, all on account of his race. This Court held that his suit was barred by intramilitary immunity.

These intramilitary immunity principles demonstrate that suits against officers in the chain of command, regardless of whether they seek damages or declaratory or injunctive relief, would impair military effectiveness and preparedness in several ways: First, they would embroil courts in second-guessing military supervision and discipline; second, they would undermine military authority by giving subordinates an opportunity to intimidate superior officers in an effort to gain better assignments or other benefits; third, they would force military officers to make decisions in anticipation of possible litigation, rather than on the basis of normal military considerations; fourth, the decisionmakers in such lawsuits would be juries or judges not necessarily trained or experienced in military methods and procedures; and finally, there are intramilitary administrative review procedures available that provide due process without the burdens associated with civil litigation.

This reasoning, central to the intramilitary immunity jurisprudence, has been embraced by the Courts of Appeals for the Fifth, Seventh, Eighth, Ninth, Eleventh and District of Columbia Circuits. *See Crawford v. Texas Army Nat'l Guard*, 794 F.2d 1034, 1036 (5th Cir. 1986); *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 771 (7th Cir. 1993); *Watson*, 886 F.2d at 1007-10; *Christoffersen v. Wash. State Air Nat'l Guard*, 855 F.2d 1437 (9th Cir. 1988); *Speigner v. Alexander*, 248 F.3d 1292, 1296 (11th Cir. 2001); *Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989).

The Second Circuit joined this consensus in concluding that adding a prayer for injunctive or declaratory relief will not bring a claim outside the scope of intramilitary immunity and therefore make it justiciable. In a thoughtful and well-

considered opinion, the Second Circuit concluded, on the basis of the foregoing principles of intramilitary immunity, that claims for injunctive relief would intrude upon the personnel decisions that commanding officers must make as they prepare their forces for military combat or support roles.

Thus, the courts of appeals, including the Second Circuit in the case at bar, are largely in agreement that merely labeling a complaint as one for injunctive or declaratory relief does not vitiate the intramilitary immunity that would otherwise bar a suit challenging military discipline, staffing or personnel decisions. Pet. App. 11a-15a.

The few courts that have held to the contrary have misapplied core principles of intramilitary immunity and have woefully underestimated the damage to military authority that would result if individual personnel suits for injunctive relief could lie. *See Wigginton v. Centracchio*, 205 F.3d 504 (1st Cir. 2000); *Walden v. Bartlett*, 840 F.2d 771 (10th Cir. 1988); *Jorden v. Nat'l Guard Bureau*, 799 F.2d 99 (3d Cir. 1986), *cert. denied sub nom. Sajer v. Jorden*, 484 U.S. 815 (1987).

Nor do these cases present an acute conflict with the decision below. In *Walden*, the court did little more than observe that *Chappell* and *United States v. Stanley*, 483 U.S. 669 (1987), do not categorically bar equitable relief in the military sphere -- an unexceptionable proposition.[1] 840 F.2d at 775. As to *Jorden*, the Third Circuit

1. The Second Circuit, in declining to adopt a categorical rule barring all military suits for equitable relief, *see* Pet. A pp. 15a-16a, recognized that some claims for equitable relief are justiciable. For example, the court noted that facial constitutional and statutory challenges to military regulations have been entertained by the courts. (Cont'd)

relied heavily upon precedent that has little, if anything, to do with chain of command military discipline or personnel matters in concluding that courts may entertain suits for injunctive relief against commanding officers. Those cases involved facial constitutional challenges to military rules or regulations, *see id.* at 109, which the Second Circuit has acknowledged are justiciable. However, suits challenging legislation or Executive branch policy decisions are very different from suits to overturn enlistment, disciplinary or work assignment orders from commanding officers. Allowing the former does not directly undermine the authority of commanding officers, whereas permitting the latter would erode the fundamental chain of command structure and circumvent established intramilitary administrative review channels. *Jorden* gave little or no weight to those factors, all of which were central to the decision in *Stanley*, a post-*Chappell*, post-*Jorden* decision.

It is thus doubtful that *Jorden* retains much validity. Indeed, courts that have considered the question more recently have rejected *Jorden* and embraced *Watson*.

(Cont'd)

Pet. App. 10a-11a (citing *Brown v. Glines*, 444 U.S. 348 (1980); *Parker v. Levy*, 417 U.S. 733 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973)). Similarly, the Second Circuit has acknowledged that injunctive relief is available to redress a violation of procedural due process based on a failure to comply with a mandatory regulation. *See Jones v. N.Y. State Div. of Military & Naval Affairs*, 166 F.3d 45, 52 (2d Cir. 1999). However, neither exception to the principle of nonjusticiability empowers the courts to review individual military personnel decisions. *See Orloff*, 345 U.S. at 94-95 (courts may not review claims of soldiers that superior officers discriminated against them in work and duty assignments).

See Dibble, Pet. App. 14a, 16a; *Speigner*, 248 F.3d at 1296. Thus, the only recent case finding a claim for equitable relief in connection with an individual personnel decision justiciable is *Wigginton*, 205 F.3d 504. This one case, in the face of significant contrary authority, does not warrant a grant of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 03-1184

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

DONALD J. DIBBLE,

Petitioner,

v.

JOHN H. FENIMORE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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March 31, 2004

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I

The case against respondent has been finally decided and is ripe for review; delay likely would be prejudicial

The court below finally decided the case against respondent. The court held respondent immune from suit and ordered the complaint against him dismissed. App. 2a.

The lower court's immunity ruling is ripe for review. Contrary to the heading on page 3 of respondent's brief, the text of respondent's brief denies that "the pending action may produce the relief petitioner seeks" against respondent. Respondent denies that either petitioner's action against the Secretary of the Air Force or any independent order by the Secretary could require respondent to reinstate petitioner in the state National Guard. Opp. Br. at 3, *citing Watson v. Arkansas National Guard*, 886 F.2d 1004, 1008 n.11 (8th Cir. 1989). Indeed, respondent asserts that, with the complaint against him dismissed, nothing can compel him to afford petitioner any relief. Opp. Br. at 3-4.

Contrary to respondent's brief at 4, resolution of petitioner's claims against the Secretary will not present "more concretely and completely" any issue raised by petitioner's complaint against respondent. The claims against the Secretary entitle petitioner to judicial review of an administrative record. *Chappell v. Wallace*, 462 U.S. 296, 303 (1983). This review has no bearing on whether respondent is immune from suit, "an important issue completely separate from the merits of the action." App. 5a, *quoting Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

Delay in determining respondent's immunity likely would be prejudicial. Unlike the complaint against the

Secretary, the complaint against respondent arises under 42 U.S.C. § 1983 and must be proved by testimony of witnesses at a trial. Delay likely would diminish their availability and memories.

II

Respondent overlooks this Court's reasoning, contradictions among the decisions he embraces, and detachment of those decisions from justiciability principles

Respondent argues that official capacity defendants should be immune from intra-military suits for equitable relief--just as individual capacity defendants are immune from intra-military suits for damages--because, "regardless" of the relief sought, these "suits . . . impair military effectiveness and preparedness" and "undermine the authority of commanding officers." Opp. Br. at 7, 9. Respondent asserts there is "consensus" among seven circuits on this, and that contrary decisions "have misapplied core principles . . . and . . . woefully underestimated the damage" caused by their rulings. *Id.* at 7-8.[1] Inexplicably, though, respondent also says that the damaging decisions misapplying core principles do not "present an acute conflict with the decision below." *Id.* In this regard, respondent says "petitioner exaggerates." *Id.* at 4.

Respondent's analysis is flawed. Respondent overlooks that this Court's opinions in *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669

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[1] Respondent erroneously asserts that *Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989), is part of this consensus. In *Kreis*, the court held that correction board decisions denying military promotion are reviewable in official capacity suits for equitable relief.

(1987), distinguished official capacity suits for equitable relief from individual capacity suits for damages. *See, e.g., Stanley*, 483 U.S. at 683 ("redress designed to halt or prevent the constitutional violation" distinguishable from "award of money damages"). Respondent overlooks that the undermining of commanders that *Chappell* said must be avoided is undermining that would occur by "exposing officers to personal liability." *Chappell*, 462 U.S. at 304. Nothing in *Chappell* opposes the undermining of unlawful military personnel decisions. To the contrary, the Court said these decisions can be redressed. *Id.* at 303.

Respondent overlooks that the lower court decisions he cites, Opp. Br. at 7, conflict with *Jones v. New York State Division of Military and Naval Affairs*, 166 F.3d 45, 52 (2d Cir. 1998), which held that a state Guard member may obtain injunctive relief from the military's violation of its own regulations. Respondent consequently overlooks that justiciability principles provide no basis for distinguishing regulatory claims from statutory or constitutional claims, and that several courts have held statutory or constitutional claims justiciable. Pet. at 6. Respondent also overlooks a contrasting point. The Second Circuit itself has held that not all regulatory claims are justiciable. Pet. at 4, n.2. Respondent fails to explain how all constitutional and statutory claims "impair military effectiveness and preparedness in several ways," Opp. Br. at 7; but no regulatory claims present any of the same impairments. Respondent has no answer to our argument that distinguishing regulatory claims from statutory and constitutional claims is arbitrary and unsupported by any justiciability principle.

Respondent also overlooks that the lower court opinions he cites are supported by neither this Court's opinions, nor any justiciability principle, when they assert

that facial challenges to written standards are allowed, but challenges to individual decisions are not. *See* Pet. at 4. Respondent overlooks that in *Brown v. Glines*, 444 U.S. 348, 357 n. 15 (1980), the Court said permissible claims are not limited to facial challenges. Respondent fails to explain why it is improper to undermine an individual unconstitutional decision, though it is proper to undermine a regulation imposing the same unconstitutional action on many. Opp. Br. at 9. Respondent has no answer to our point that distinguishing cases based on whether they challenge a decision applicable to one, or a pronouncement applicable to many, is arbitrary and unsupported by any principle of justiciability--particularly where the decision and the pronouncement are unconstitutional for the same reason.

CONCLUSION

The petition for a writ of certiorari should be granted.

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